

IT IS SO ORDERED.

Dated: May 02, 2007
09:21:04 AM


Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DIANE ELAINE BARBER,
Debtor.

CASE NUMBER 03-40045

MARK A. BEATRICE, TRUSTEE,
vs.

ADVERSARY NUMBER 03-4162

COUNTRYWIDE HOME LOANS, INC.
et al.,
Defendants.

HONORABLE KAY WOODS

ORDER FOR SANCTIONS AGAINST DEFENDANT THE MORTGAGE ZONE

On April 3, 2007 this Court entered Memorandum Opinion Regarding Trustee's Motion for Sanctions ("April 3 Opinion") (Doc. # 172) and Order ("April 3 Order") (Doc. # 173), which provided for the following sanctions against Defendant The Mortgage Zone, Inc. ("TMZ"): (i) imposition of monetary sanctions in an amount to be determined to compensate Trustee for having to file the Motion to Compel (Doc. # 137) and the Motion for Sanctions (Doc. # 141); and

(ii) "to the extent Trustee is not able to produce evidence concerning any element of a cause of action because TMZ failed to respond to the document request, Trustee will be deemed to have carried its burden of proof on such issue." (April 3 Order at 2.)

In accordance with the April 3 Opinion and Order, on April 11, 2007, counsel for Trustee filed Plaintiff Trustee's Notice of Itemized Statement of Costs and Expenses ("Notice of Costs")(Doc. # 179), to which was attached an itemized statement for 36.34 hours of attorney time at an hourly rate of \$175.00. The Notice of Costs requested \$5,484.50. Also in accordance with the April 3 Opinion and Order, on April 23, 2007, TMZ filed Defendant The Mortgage Zone, Inc.'s Objections to Plaintiff Trustee's Notice of Itemized Statement of Costs and Expenses ("Objection")(Doc. # 185). TMZ objected to the Notice of Costs on three grounds, as follows: (i) 11 U.S.C. § 328(a) prohibits the requested award of attorney fees; (ii) the requested fees are excessive; and (iii) Trustee did not incur any attorney's fees as a result of TMZ's failure to comply with discovery rules and orders.

As this Court previously stated, "the purpose of imposing sanctions is accountability." (April 3 Opinion at 8.) This Court attempted to craft a sanction that would make Trustee whole and hold TMZ accountable for its willful abuse of the discovery process. The Court believes that it accomplished those purposes in the sanctions set forth in the April 3 Order and in this Order.

As set forth below, the Court has considered the Notice of Costs and the Objection and has determined that the appropriate award of sanctions to Trustee is \$3,325.00.

I. Section 328 is Inapplicable

TMZ argues that the Court cannot award attorney fees to Trustee because counsel for Trustee agreed to accept a contingency fee of one-third of the gross recovery (if any) in this case. TMZ postulates that, since the Court approved employment of Trustee's counsel on a contingency fee basis, the Court is prohibited from modifying the fee arrangement between Trustee and his counsel. This argument entirely misses the mark. The Court is not in any way modifying the fee arrangement between Trustee and his counsel. Section 328(a) is totally irrelevant to the matter before the Court. This Court has found TMZ guilty of violating this Court's December 29, 2006 Order ("December 29 Order") and abusing the discovery process.¹ As a consequence, this Court determined that it "shall award an appropriate sanction based upon the itemized statement. . . ." (April 3 Opinion at 12.)

As TMZ expressly recognizes, "The Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure both anticipate that a party might fail to comply with discovery rules and provide remedies for such failure. . . ." (Objection at 2.) The Court has held that TMZ should be sanctioned for its willful and wrongful conduct by awarding Trustee a monetary sanction that the Court determines to be appropriate after reviewing the Notice of Costs and the Objection. This determination of an appropriate monetary

¹ TMZ's last argument in the Objection refers to "TMZ's alleged failure to comply with discovery rules and orders." (Objection at 4.) There is nothing "alleged" about TMZ's failure to comply with the December 29 Order. As set forth in the April 3 Opinion and Order, this Court found that TMZ's conduct was "willful and without justification." (April 3 Opinion at 7.)

sanction in no way impacts the fee arrangement by and between Trustee and his counsel.

II. The Amount of the Itemized Fees

TMZ's second argument is that the "requested fees are clearly excessive." (Objection at 3.) Counsel for Trustee sets forth an itemized statement showing a total of 36.34 hours, although the Notice of Costs and Affidavit by Barbara Powell ("Powell Aff.") indicate that counsel spent a total of 31.34 hours on the Motion to Compel and the Motion for Sanctions. The Notice of Costs does not provide an explanation for the difference of five hours. Ms. Powell also represents that a "reasonable hourly rate for an attorney working in Youngstown, Ohio on a matter such as this case is \$175.00." (Powell Aff., ¶ 5.)

TMZ complains that Trustee's counsel "spent an unreasonable amount of time preparing motions and briefs that do not address any novel issues." (Objection at 3.) This Court agrees that the time involved in drafting the motions and replies may be excessive given the lack of novelty in the issues. As a consequence, this Court is prepared to find that 19 hours would be a reasonable number of hours to spend on these matters. The Court determined this number by multiplying 5.5 hours (the actual number of hours to prepare the motion for sanction) by 3 (motion to compel, motion for sanctions and reply) and adding 2.5 hours for the research relating to TMZ's Response (*i.e.*, $5.5 \text{ hours} \times 3 = 16.5 \text{ hours} + 2.5 \text{ hours} = 19 \text{ hours}$).

TMZ also points out that no affidavit by attorney David Barbee was attached to the Powell Affidavit, which purportedly related to the reasonableness of the asserted hourly rate. (Objection at 3-4; Powell Aff., ¶ 5.) This Court's experience in reviewing hundreds

of fee applications permits it to find that an hourly rate of \$175.00 is within the range of reasonable and customary rates for this locale. Accordingly, this Court finds that an appropriate monetary sanction in this case is \$3,325.00.

III. Whether Trustee Incurred Attorney Fees

The last argument posed by TMZ is that "Trustee did not incur any attorney fees as a result of TMZ's alleged failure to comply with discovery rules and orders." (Objection at 4.) As set forth above, there is no question that TMZ actually violated the December 29 Order and willfully failed to comply with the discovery process. (See note 1, *supra*.) This argument essentially repeats TMZ's first argument that, since the Trustee has a contingency fee arrangement with counsel, Trustee has not incurred any attorney fees as a result of TMZ's wrongful conduct. As set forth above, this argument is not relevant to the imposition of sanctions by the Court. This Court tried to fashion a reasonable monetary sanction based upon time spent in Trustee's pursuit of discovery. It is of no moment whether Trustee's counsel was charging an hourly rate.

IV. Anticipation of Misconduct

Last, this Court will address the following statement by TMZ, which astounded the Court: "At the time that the Court approved this fee arrangement [by and between Trustee and counsel], Counsel and Trustee could have anticipated that a party might fail to comply with the discovery rules." (Objection at 2.) This Court believes that all counsel can and should be able to anticipate that opposing counsel will follow the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Bankruptcy Code, the Canons of Ethics and the Code of Professional

Responsibility. In addition, this Court fully expects (and believes that attorneys who practice in this Court can anticipate) that each attorney who has been admitted to the Northern District of Ohio will remember and be bound by his or her oath. As a consequence, although it may be reasonable to anticipate some discovery disputes, it is not reasonable to anticipate that opposing counsel will engage in misconduct that is sanctionable. Although such unfortunate conduct does occasionally occur, it is not the norm and should not be anticipated.

The fact that TMZ cavalierly states that its misconduct should have been anticipated causes this Court to wonder if the sanctions set forth in the April 3 Opinion and Order and herein are, indeed, enough to hold TMZ accountable.

IT IS SO ORDERED.

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